

CATCHWORDS

ADMINISTRATIVE LAW - judicial review on grounds of ultra vires or defective exercise of powers - giving reasons - finding that none of the witnesses credible - whether finding of facts required.

Minister for Immigration, Local Government and Ethnic Affairs v Dhillon (Full Federal Court, 8 May 1990, unreported)
University of Wollongong v Metwally (No 2) (1985) 59 ALJR 481; 60 ALR 68 (sub nom *Metwally v University of Wollongong*)
Teoh v Minister for Immigration and Ethnic Affairs (1994) 49 FCR 409
Water Board v Moustakas (1988) 180 CLR 491
Connecticut Fire Insurance Co v Kavanagh [1892] AC 473
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418
Green v Sommerville (1979) 141 CLR 594
O'Brien v Komesaroff (1982) 150 CLR 310
Coulton v Holcombe (1986) 162 CLR 1
Banque Commerciale SA (in liq) v Akhil Holdings Ltd (1990) 169 CLR 279
Commissioner of Taxation v Brambles Holdings Ltd (1991) 28 FCR 451
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589
Henderson v Henderson (1843) 3 Hare 100
Mam Ki Kim v Minister of Immigration and Ethnic Affairs (1995) 37 ALD 481
McDonald v Director-General of Social Security (1984) 1 FCR 354
Re: Tang v Director-General of Social Security (1981) 3 ALN N83

Administrative Decisions (Judicial Review) Act (1977) (Cth) ss 11(6), 15 & 16
Federal Court of Australia Act 1976 (Cth), ss23 & 32
Judiciary Act 1903 (Cth), s39B
Migration Act 1958 (Cth), s135
Migration Regulations 1989 (Cth), reg126

ESTER JONES v THE MINISTER OF STATE FOR IMMIGRATION AND ETHNIC AFFAIRS

NO WAG 63 OF 1995

JENKINSON, CARR and R D NICHOLSON JJ
PERTH
6 DECEMBER 1995

IN THE FEDERAL COURT OF AUSTRALIA)
WESTERN AUSTRALIA DISTRICT REGISTRY) No. WAG63 of 1995
GENERAL DIVISION)

On Appeal from a Single Judge of the Federal Court of
Australia

BETWEEN: ESTER JONES

Appellant

AND: THE MINISTER OF STATE FOR
IMMIGRATION AND ETHNIC
AFFAIRS

Respondent

CORAM: Jenkinson, Carr and R.D. Nicholson JJ.

PLACE: Perth

DATE: 6 December 1995

MINUTES OF ORDER

THE COURT ORDERS THAT:

1. The appellant have leave to amend the originating application in the proceeding numbered WAG37 of 1994 by adding the grounds set out in the Schedule to this order.
2. The appellant have leave to amend the notice of appeal by adding as grounds of appeal the grounds set out in the Schedule to this order.
3. The motion of which notice is dated 10 October 1995 be dismissed.
4. The appeal be dismissed.
5. The respondent's costs of the appeal be paid by the appellant.

(Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.)

The Schedule

- 3A The procedures that were required by law to be observed in connection with the making of the decision were not observed in that the delegate, in its Reasons for Decision dated 28 February 1994, failed to make or set out its findings on material questions of fact, contrary to section 135(1)(c) (Now section 368(1)(c)) of the Migration Act 1958.

PARTICULARS

Material questions of fact in relation to which the delegate failed to make or set out findings:

- (i) The nature and extent of the personal relationship between the Applicant and her husband with particular reference to such matters such as love, affection and caring;
- (ii) The extent to which the medical condition of the Applicant's husband made incidences of what may be described as a "normal" marital relationship impossible in the case of the Applicant and her husband;
- (iii) The circumstances under which the Applicant had first met Mr Mundy;
- (iv) The nature and extent of the sexual contact, if any, that had occurred or was occurring between the Applicant and Mr Mundy;
- (v) The nature and extent of any personal relationship between the Applicant and Mr Mundy;
- (vi) The extent to which any relationship referred to in (v), if found, influenced the relationship between the Applicant and her husband;
- (vii) The existence or not of a genuine and continuing marital relationship between the Applicant and her husband.

- 3B The procedures that were required by law to be observed in connection with the making of the decision were not observed in that the delegate in its Reasons for Decision dated 28 February 1994 failed to refer to the evidence or other material on which any findings of fact was based, contrary to

section 135(1)(d) (now section 368(1)(d) of the
Migration Act.

PARTICULARS

Ostensible findings in relation to which the failure occurred:

- (i) That the Applicant had met her husband in response to an advertisement placed by him in the Sunday Times, seeking a Filipino wife;
 - (ii) That the Applicant's motive for marrying her husband was primarily for the sake of gaining permanent residence in Australia.
- 3C The decision involved an error or errors of law in that in relation to the central issue before the delegate, namely whether there existed, at the time the matter was heard by the delegate, a genuine and continuing marital relationship between the Applicant and her husband, the delegate:
- (a) failed to make findings on material facts relating to this issue, as set out in paragraph 3A;
 - (b) failed to reach any conclusion on this issue;
 - (c) relied on the notion of "burden of proof" to refuse in relation to this issue, the application for an EESEP.

PURSUANT TO:

- (a) SS15, 16 Administrative Decisions (Judicial Review) Act.
- (b) SS23, 32 Federal Court of Australia Act.
- (c) S 39B Judiciary Act.

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Respondent

CORAM: Jenkinson, Carr and R.D. Nicholson JJ.

PLACE: Perth

DATE: 6 December 1995

REASONS FOR JUDGMENT

JENKINSON J.

Appeal from an order of a single judge of the court which dismissed an application by the appellant for an order of review in respect of a decision by the Immigration Review Tribunal affirming a decision of a delegate of the respondent that an extended eligibility (spouse) entry permit under the Migration Regulations be not granted to the appellant.

The refusal of the permit resulted from a failure to find that the appellant's spouse, an Australian citizen, had

at the time when the appellant's application for the permit was decided "a marital relationship with the [appellant] that is genuine and continuing". Power to grant such a permit was at relevant times conditioned upon satisfaction of each of several criteria, one of which was that the applicant for the permit be the spouse of an Australian citizen or permanent resident who has with the applicant a relationship of that specified description. (See reg. 126 of the Migration Regulations 1989.)

The application for review, as amended at the time of the trial, was grounded upon allegations that the Tribunal had taken into account irrelevant considerations and had failed to take into account relevant considerations and that the making of the decision was so unreasonable that no reasonable person could have so exercised the power conferred by the enactment in pursuance of which it was purported to be made. But on the hearing of the appeal this court was moved for orders amending the application for review - and the notice of appeal - to raise other grounds. The court reserved its decisions on those motions and heard the submissions of the parties on both the original and the proposed grounds.

The appellant, who was born on 13 October 1949, is a citizen of the Republic of the Philippines. She entered Australia on 4 August 1991, under a visa permitting her to

remain here for 6 months. On 29 October 1991 she married Harry Jones, an Australian citizen who was about 76 years old and in bad health. One of the appellant's daughters, then aged about 4, was brought from the Philippines to live with her mother. Since her marriage the appellant and her husband have lived in the same residence, at several places, but have not engaged in a sexual relationship. At one time they lived in a house occupied by the appellant's sister, who is a permanent resident of Australia. But the sisters quarrelled. Less than a year before the hearing of the application for the permit by the Tribunal the appellant and her husband took up residence with Raymond Leslie Mundy, with whom they have remained on friendly terms and in whose house they were still living at the time of that hearing. There was before the Tribunal conflicting, and confused, evidence relevant to the question whether at the time of hearing, or at any other time after they met, the appellant and Mr. Mundy were in a sexual relationship. While the evidence was uncontradicted that the appellant kept house to the satisfaction of her husband and Mr. Mundy, there was also evidence that the appellant and her husband did not associate in Mr. Mundy's house after the evening meal until morning.

In its reasons for decision the Tribunal narrated the history of the association between the appellant and her husband and between them and the appellant's sister and

between each of them and Mr. Mundy. The narrative disclosed also a substantial number of contradictions, in the accounts each of those four persons had given, in evidence before the Tribunal and during interviews between officers of the respondent's Department and each of the appellant and her husband, concerning the events and circumstances canvassed in the narrative. But nowhere in its reasons did the Tribunal indicate any preference for one version of any of those events and circumstances. Then, having stated several applicable legal principles, including those prescribing what in relation to a curial proceeding is called the onus of proof, the Tribunal concluded:

"In this instance, having considered the evidence of the various witnesses as well as the evidence contained in the file, the Tribunal is unable to reach the finding that on the balance of probabilities, the relationship between the Applicant and Mr Jones is a 'genuine and continuing' one as required under subregulation 126(1)(a)(i)(E). Given the inconsistencies in the evidence of the various witnesses the Tribunal is still in a state of uncertainty as to the standing of the relationship. Whilst the Applicant's motive for marrying Mr Jones primarily for the sake of gaining permanent residence is not on its own determinative of the issue, when considered in light of the other circumstances the evidence is clearly deficient in disclosing a mutual commitment to a shared life to the exclusion of others.

Given that the Applicant has failed to meet one of the relevant prescribed criteria, she is accordingly not entitled to a spouse EETEP."

Before the learned trial judge the allegation that the Tribunal had taken into account irrelevant considerations resolved into an assertion that the Tribunal's narration of evidentiary inconsistencies, and some of the references it made to events and circumstances of relatively minor relevance to a determination whether the appellant's marital relationship was "genuine and continuing", showed a concern with irrelevant considerations. The learned trial judge demonstrated, in my opinion, that the Tribunal's concern about contradictions and inconsistencies of the kind instanced by counsel for the appellant was reasonably excited in the circumstances, because the Tribunal recognised that it had no basis for a conclusion that the marital relationship was of the required character unless it was persuaded of the witnesses' reliability. His Honour also demonstrated, in my opinion, that the events and circumstances instanced by counsel reasonably engaged the consideration of the Tribunal because of the light a finding about each of them could throw either on the state of the marital relationship at the time as at which the Tribunal was required to evaluate that relationship or on the reliability of one or more of the persons who gave evidence concerning that event or occurrence.

The allegation that the Tribunal had failed to take into account relevant considerations was seen by the learned trial judge, correctly in my opinion, as in the main an

allegation that several pieces of evidence likely, if accepted, to strengthen the case for the appellant had not been accepted by the Tribunal.

The learned judge did not regard the decision as itself unreasonable and accordingly dismissed the application. He then added these observations:

"Before concluding this judgment, however, I should repeat that it may be possible to criticise the Tribunal's reasons for decision on the basis that the Tribunal failed to make proper findings of fact. It must be a rare case indeed where a Tribunal, conducting an administrative review, forms the view that none of the witnesses before it can be relied upon with the result that the Tribunal is unable to reach any conclusion at all on a matter essentially of fact. This was not, however, as I have already indicated, a submission explored in argument on behalf of the applicant and accordingly it would be inappropriate for me to comment further upon it."

His Honour had in his reasons for judgment earlier observed:

"While it is possible to be critical of the Tribunal's decision in the present case, particularly having regard to the lack of found facts, that is not a matter upon which the applicant relies. Rather, it is accepted that the Tribunal's comments in their reasons on matters such as onus of proof were correct and that the Tribunal could, if unable to accept the evidence of any witness, properly conclude that the applicant should fail."

During the course of his submissions at trial counsel for the

applicant, who was not counsel in the appeal, referred to a statement by a Full Court of this court in Minister for Immigration Local Government and Ethnic Affairs v. Dhillon (WAG26 or 1989; unreported; judgment 8 May 1990) that "a primary responsibility of a statutory decision maker is to reach firm conclusions about those facts which are relevant to his or her decision. If the decision maker is subsequently called upon to state his or her findings, he or she should do so in clear and unambiguous terms; not being reticent in expressing findings adverse to particular people, if in fact they were the actual findings reached at the time of the decision. Contrary to the submission put by counsel for the Minister, it is not correct to discount a factor favourable to

an applicant by reference to conflicting evidence or doubts. A person affected by a statutory decision is entitled to have the case determined by reference to found facts, not suspicions or conflicts of evidence. Only if this is done is it possible for the affected person to understand precisely the reason why the decision went as it did. Only if this is done it is possible for a judicial reviewer to determine whether there was evidence before the decision maker to support the finding". The following dialogue ensued:

"HIS HONOUR: Well, I understand that principle. Is that really covered, though, by your grounds? I am not sure that it is, is it? I mean, there may well be an appropriate argument for saying that the tribunal had an obligation to find facts and did not, at least, relevant facts, and did not. I am not sure that is dealt with by arguing they did not take into account relevant matters.

MR MULLANY: Your Honour, I had not put my position clearly. I am not suggesting that that in itself is a ground of review. What I am suggesting - - -

HIS HONOUR: What in itself?

MR MULLANY: That they failed to make findings of fact. What I am suggesting, your Honour, is that - - -

HIS HONOUR: I would have thought it probably is, but anyhow, it is a matter for you, but it is not - I do not have the Act here, but the 'failure to comply with' law, decision-makers failure to comply with law. That is 1(a), is it not? I have forgotten, 5(1)(a) I think, but it is not a ground that you have taken.

MR MULLANY: Not it is not, your Honour. I accept what your Honour is saying. What I have taken your Honour to that passage for is just

to show the similarity in approach taken by Dhillon, the decision-maker in Dhillon and the decision-maker here.

HIS HONOUR: Can we get this much clear? Is it conceded by your client, because it would seem not to be a matter in issue, that the tribunal made whatever finding of facts it needed to make?

MR MULLANY: Not, it is not conceded.

HIS HONOUR: Well, it is not a matter of relevant versus irrelevant considerations at all."

His Honour returned to the subject later during argument, but I am unable to derive from what counsel for the applicant then said any clearer conception of what was intended to be submitted by him. Certainly no application was made to amend the grounds of the application after the dialogue which I have quoted occurred.

The first motion for leave to amend the originating application and the notice of appeal so that this court might consider the proposed grounds was supported by reference to the undoubted fact that no further evidence could have been adduced at the trial which might have been relevant to the determination of those proposed grounds. Each of the proposed grounds raises questions of law determinable upon a consideration of the material before the Tribunal and of the Tribunal's reasons for decision. The authorities cited in the reasons for judgment of Nicholson J., which I have had the advantage of reading, establish that in those circumstances

this court is free to determine whether it is expedient and in the interests of justice that the motions be granted.

The proposed grounds contain no proposition contradictory of a proposition forming part of the argument advanced at trial. This case is in that respect quite unlike University of Wollongong v. Metwally (No. 2) (1985) 59 A.L.J.R. 481; 60 A.L.R. 68 (sub. nom. *Metwally v. University of Wollongong*). The failure of counsel for the applicant at trial to take up the learned trial judge's suggestion was not shown to have been in disregard of his instructions or to have been plainly mistaken. But one consequence of that failure was an expression by the learned trial judge, in his careful reasons for a judgment he had reserved, of unease about the course which the hearing of the application had taken. Three of the four proposed grounds in substance allege a failure by the Tribunal to comply with the requirements of what at the relevant time was s.135 of the Migration Act 1958, that the Tribunal set out, in the written statement that sets out its decision, the findings on any material questions of fact, and refer to the evidence or any other material on which the findings of fact were based, and in particular a failure to comply with those requirements in relation to the ultimate question of fact as to whether the appellant's marital relationship with her husband was "genuine and continuing". Observance of such requirements by a tribunal administering important and publicly scrutinised immigration laws should be encouraged by this court. A determination whether in its exposition of its conclusion about that ultimate question of

fact the Tribunal satisfied those requirements is in my opinion expedient and in the interests of justice. I would accede to the motion that the originating application be amended by adding those three grounds.

The material questions of fact concerning which no finding was, but should have been, stated by the Tribunal were specified in particulars subscribed to one of the added grounds, thus:

- "(i) The nature and extent of the personal relationship between the Applicant and her husband with particular reference to such matters such as love, affection and caring;
- (ii) The extent to which the medical condition of the Applicant's husband made incidences of what may be described as a 'normal' marital relationship impossible in the case of the Applicant and her husband;
- (iii) The circumstances under which the Applicant had first met Mr Mundy;
- (iv) The nature and extent of the sexual contact, if any, that had occurred or was occurring between the Applicant and Mr Mundy;
- (v) The nature and extent of any personal relationship between the Applicant and Mr Mundy;
- (vi) The extent to which any relationship referred to in (v), if found, influenced the relationship between the Applicant and her husband;
- (vii) The existence or not of a genuine and continuing marital relationship between

the Applicant and her husband."

These were questions to the determination of which the appellant, her husband, her sister and Mr. Mundy gave relevant evidence. The documentary evidence, other than records of statements by several of those persons, provided no means of determining the questions. After setting out the relevant legislative provisions, the statement of the Tribunal's reasons for its decision continued:

"The Tribunal did not find the evidence of the various witnesses to be reliable. Mr Jones evidence was vague and evasive and on various occasions, he has had to refer to his wife before he answered the questions put to him by the Tribunal. Mr Mundy suffers from a severe psychiatric condition as indicated by a medical report he had tendered at the outset of the hearing. Although he was a co-operative witness, he soon became anxious and confused. The Applicant's and her sister's evidence was in the main inconsistent particularly in relation to the circumstances surrounding the Applicant's and her husband's first meeting. The Tribunal did not find them to be credible witnesses."

Each of the witnesses is thus stated to have failed to engender belief in the Tribunal as to the correctness of the assertions of facts given by her or him in evidence. The only evidence by which persuasion that the marital relationship was genuine and continuing could have been induced was not accepted. In those circumstances there was in my opinion no obligation, imposed by s.135 or otherwise, to set out what material facts the finding of which in the particular

circumstances of the case would have induced that persuasion. Having regard to the variety of psychologically possible relationships within the ménage à trois, it seems that, if such an obligation were said to exist, the Tribunal might have had to set out several different sets of material facts, the

finding of any one of which would have induced that persuasion. In the narrative, of the associations between the appellant, her husband and Mr. Mundy, which in the Tribunal's statement of reasons follows the passage from those reasons last quoted, there is a reference to the question whether the appellant and Mr. Mundy were cohabiting away from her husband in the house where the three lived. The narrative discloses the contradictory statements of husband and wife and in that way demonstrates the unlikelihood of a determination of that question in favour of the appellant when none of the three had been found to be credible in evidence. I do not say that the ultimate question of fact - whether the marital relationship was genuine and continuing - could not be determined in the affirmative unless there were first a finding that such a cohabitation had not occurred. But it would seem in the highest degree improbable that the ultimate question of fact could be determined in the affirmative without a finding one way or the other as to whether such a cohabitation was subsisting. This was a case where no finding either way on the ultimate question of fact was possible when none of those three persons was credible in evidence. On the proper construction of the Migration Act 1958 and the Migration Regulations the permit could not be granted unless an affirmative finding on that question were made. The statement of the Tribunal's reasons satisfied the requirements of s.135 of the Migration Act 1958 by demonstrating that the ultimate

fact - the existence of a genuine and continuing marital relationship - could not be found by reason of the lack of credible evidence that there was such a relationship, and by referring to evidence and other circumstances on which the conclusion was based that the evidence tending to prove the existence of such a relationship was not credible.

I would dismiss the motion, of which notice was filed shortly before the hearing of the appeal commenced, for leave to add a further ground of appeal. This proposed ground reads"

"Further and in the alternative, the Learned Judge at first instance erred in failing to quash the decision under review on the ground that the delegate had taken into consideration irrelevant considerations, namely perceived inconsistencies between the evidence of the witnesses who appeared before it, and resultant 'credibility findings' against all the witnesses, in circumstances where the delegate had made no findings on or in relation to all or any of the following facts."

Then follow the particulars I have previously quoted.

Leave having been given to add the three grounds to which reference has been made, this ground seems to me otiose. I agree with the reasons given by Nicholson J. for characterising it as unmeritorious.

In my opinion the appeal should be dismissed with costs.

I certify that this and the 13 preceding pages are a true copy of the Reasons for Judgment of the Honourable Justice Jenkinson.

Associate

Dated:

IN THE FEDERAL COURT)
OF AUSTRALIA)
WESTERN AUSTRALIA)
DISTRICT REGISTRY) **No. WAG 63 of 1995**
GENERAL DIVISION)

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B E T W E E N :

ESTER JONES

Appellant

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Respondent

CORAM: Jenkinson, Carr & R.D. Nicholson JJ.

PLACE: Perth

DATE: 6 December 1995

REASONS FOR JUDGMENT

CARR J.

Introduction

This is an appeal against a judgment of a Judge of this Court (Hill J.) dismissing the appellant's application for an order of review of a decision of the Immigration Review Tribunal ("the Tribunal"). The appeal raises four questions. The first question is whether the appellant should be granted leave to amend her original application by adding three further grounds for

the relief sought in that application. The second question is whether the appellant should be permitted to argue those grounds in the appeal to this Court either on the basis of leave being granted so to amend the application or even in the absence of such leave. The third question is whether the appellant should have leave to amend her notice of appeal by adding a fourth ground of

appeal. If so, that ground would be the only ground of appeal which asserts that the learned trial judge made any error. The fourth question which arises:

- . (in respect of the first three grounds mentioned above) only if leave to amend the original application is granted; or
- . this Court, in its discretion, permits those three grounds to be argued without any such amendments being made to the original application; or
- . leave is granted to amend the notice of appeal by adding the fourth ground referred to above,

is whether any of those grounds require the orders made at first instance to be set aside and an order of review to be issued.

Factual Background and History of Matter

The following factual background is taken largely from the reasons for judgment of Hill J. and from documents filed on behalf of the appellant.

Mrs Jones is a citizen of the Philippines. She was born on 13 October 1949, visited Australia first in 1988 and arrived in Australia for the second time on 4 August 1991. On that occasion, she was granted a visitor's visa with permission to remain for a period of six months.

At some time between 27 August 1991 and October of that year, Mrs Jones met, by arrangement, Mr Harry Jones. Mr Jones was then 76 or 77 years of age and in bad health. His wife had died about a year before and he lived on his farm near Pinjarra which is some 70 kilometres south of Perth. On the day they met, according to Mrs Jones, Mr Jones proposed marriage to her. She told him that she would like to think about it. One week later (the next time they met) she accepted the proposal. She was persuaded to do so by her sister, Mrs Rose Peters and her sister's husband (with whom she was then living) as a means of assisting her to stay in Australia.

On 29 October 1991 Mrs Jones married Mr Jones and, on the basis of being married to an Australian citizen, she applied, on 13 January 1992, to remain permanently in Australia. At some time after the marriage, one of Mrs Jones' daughters was brought to Australia at Mr Jones' expense. The remaining daughter stayed in the Philippines to care for Mrs Jones' mother. Shortly after their marriage, Mr Jones sold his farm for \$85,000 and purchased a home in North Pinjarra for \$65,000. That house was later sold (for \$68,000) after which Mr and Mrs Jones and her daughter lived with her sister and brother-in-law for a time. Mrs Jones' evidence, filed in support of her application for leave to file and serve her notice of appeal out of time, is that neither she nor her husband now have any significant assets.

It would appear that, while Mr and Mrs Jones were so resident, in about April 1993, Mrs Jones met a Mr Raymond Mundy who has a home in Medina which is not far from Perth. The following month, Mr and Mrs Jones and Mrs Jones' daughter moved into Mr Mundy's home. The matter of whether there was any relationship between Mrs Jones and Mr Mundy was an issue before the Tribunal.

Mrs Jones' application to remain permanently in Australia was refused and she sought review by the Migration Internal Review Office of that decision. The decision was

affirmed and in consequence Mrs Jones lodged an application for review by the Tribunal. There again, Mrs Jones was unsuccessful and the decision under review was affirmed by that Tribunal. She then applied to this Court under the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) for judicial review of the Tribunal's decision.

That application for review was made, basically, on three grounds. The first was that the decision was an improper exercise of power in that the Tribunal took into account irrelevant considerations. The second ground also alleged an improper exercise of power in that the Tribunal failed to take into account relevant considerations. The final ground was that the decision was an improper exercise of power in that it was so unreasonable that no reasonable decision-maker could have come to it.

Hill J. held that none of these three grounds had been made out. The appellant does not seek, in the proposed appeal, to challenge his Honour's conclusions in that regard, save to the extent set out in the proposed new fourth ground of appeal. I shall return to that ground below.

On 14 June 1995 the appellant lodged an application for an extension of time in which to file and serve a notice of appeal. On 5 September 1995 the appellant filed a notice of motion for leave to amend her original

application for an order of review by the addition of the three further grounds referred to above. In summary, those grounds are that procedures required by law to be observed by the Tribunal were not observed and that the Tribunal's decision involved errors of law. In essence, those grounds are

concerned with the Tribunal's alleged failure to make or set out certain findings and to refer to the evidence or other material on which any findings of fact were based, contrary to s.135(1)(c) and (d) respectively [now s.368(1)(c) and (d)] of the *Migration Act* 1958. Those motions were heard on 8 September 1995 and subsequently the parties were given an opportunity to file submissions on the question whether I had power to make the orders sought in the notice of motion filed on 5 September 1995. On 18 September 1995 I made orders giving the appellant leave to file and serve a notice of appeal no later than 22 September 1995 and reserving to this Court the appellant's motion for leave to amend her application for an order of review. I made the latter order because I did not consider that I had the authority, sitting as a single Judge exercising the appellate power of this Court, to make the order sought in that motion.

Whether the appellant should have leave to amend her application or, even without such leave, to rely upon the three abovementioned grounds on appeal?

Tendered in evidence in the appeal was a copy of the transcript of the proceedings before Hill J, which included counsel's oral submissions. During the course of argument in those proceedings, Mrs Jones' then counsel complained that the Tribunal "... did not make a finding of fact in relation to anything". The learned trial judge asked Mrs Jones' counsel

whether his client was arguing that the Tribunal had an obligation to find relevant facts and had failed to do so. His Honour drew counsel's attention to the fact that this did not appear to have been covered by the grounds of the application for the order of review. Counsel expressly disclaimed any reliance upon failing to make findings of fact as being a ground of review in itself. It would seem possible that counsel was simply stating what he thought to be a proposition of law. If so, counsel may have overlooked the provisions of s.135 of the *Migration Act* (now s.368 of that Act). However, counsel's response may have reflected his assessment of the factual circumstances (i.e. what was expressly or impliedly contained in the Tribunal's reasons for decision), although the general tenor of his submissions suggests otherwise. I should perhaps at this stage note that the application for an order of review had been amended on several occasions prior to the hearing and was further amended at the hearing on 2 November 1994.

Counsel for the appellant before the trial judge was quite clearly put on notice by Hill J. on more than one occasion during the hearing that his Honour's understanding was that Mrs Jones was not complaining about the matters which she now seeks to raise in her grounds of appeal. Similarly, the thrust of the respondent's submissions before Hill J. was that the Tribunal, having made its findings as to credibility of witnesses, was entitled

to ignore their evidence and not to proceed to make express findings on the matters raised by such evidence. The appellant's counsel did not seek to reply.

In my view, it would not be proper to allow a party to argue as a ground of appeal a ground which was not specifically relied upon at first instance, without amendment being made to the originating application. I reject the appellant's submission that such amendments are purely formal. In my view, in defining the issues by way of setting out the grounds upon which relief is sought, an originating application not only defines the issues with which each party has to be concerned at first instance, but also throughout the determination of the matter. Amendments to that document might still be relevant at first instance if an appellate court were to remit all or part of the matter to the trial judge. Furthermore, such amendment provides a most important reference point for ascertaining the issues between the parties at an intermediate appellate level and at final appellate level should the matter proceed that far. In my opinion if an intermediate appellate court sees fit to allow an appellant to raise issues not raised at first instance then, as a general rule, for the reasons set out above, a proper foundation should be laid by causing the originating application to be amended.

Dr H. Schoombee, counsel for the appellant, submitted that this Court may

hear and decide the appeal without the necessity of amendment to the original application. In support of that submission Dr Schoombee pointed to s.11(6) of the *ADJR Act* which provides:

"(6) Applicant Not Limited to Grounds in Application

The applicant for an order of review is not limited to the grounds set out in the application but, if he wishes to rely on a ground not so set out, the Court may direct that the application be amended to specify that ground."

No authority was cited for that proposition and I have been unable to find any. However, in my view, a reading of s.11 as a whole demonstrates that it is concerned with the initiation of proceedings in this Court and the conduct of the hearing of an application at first instance. I do not read s.11(6) as entitling an appellant, after such a hearing, and having activated the appeal processes provided for in the *Federal Court of Australia Act*, in effect to disregard the grounds relied upon in the original application when the appeal comes before the Full Court. In my opinion s.11(6) does not have the effect which counsel for the appellant contends.

The appellant relies upon the course taken by the Full Court of this Court in *Teoh v. Minister for Immigration* (1994) 49 FCR 409. In that case the Full Court granted leave to amend the grounds in the original application and in the grounds of appeal to raise not only matters which had not been agitated before the Judge at first instance, but also a matter which had been expressly abandoned. The Full Court did this because to do so did not

involve resolution of factual issues, there were special circumstances concerning seven Australian children who had not been parties to or represented in the proceedings and there was no relevant prejudice to the respondent in taking that course.

For reasons expressed by Lee J. and myself in *Teoh* (with which Black C.J. agreed) and the authorities there cited I consider that this Court has power to make such an amendment and the matter is simply one of whether, as a matter of discretion, that power should be exercised. The respondent did not seek to argue to the contrary.

Before I had the advantage of reading the draft judgments of Jenkinson and Nicholson JJ in this matter I had formed the view that, as a matter of discretion, leave to amend should not be granted. This was despite the fact that raising of the new grounds does not involve resolution of factual issues, the respondent did not submit that he might have conducted his case differently at the trial if the new grounds had been relied upon at first instance and there does not appear to be any other significant prejudice to the respondent.

Initially my view was that there was an overriding public interest which, in the circumstances of this matter, transcended the private interests of the

parties and tipped the scales of the discretionary balancing exercise against granting leave either to amend the original application or to allow these new grounds to be agitated on this appeal. That public interest is the finality of litigation and it finds expression in the principle that a party is bound by the conduct of his case. In this matter, counsel for the appellant expressly disclaimed any reliance on the grounds which the appellant now seeks to put forward. As the High Court said in *Metwally v. University of Wollongong* (1985) 60 ALR 68 at p.71:

"It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so."

On first impression, it seemed to me that there were no exceptional circumstances in the present matter nor that it would be either "expedient" or "in the interests of justice" to entertain these points - see *Water Board v. Moustakas* (1988) 180 CLR 491 at p.497. In particular, there was no evidence that the appellant's counsel at first instance was incompetent or exceeded his instructions.

However, on reflection, I agree with Jenkinson and Nicholson JJ that it is expedient and in the interests of justice that we determine whether the Tribunal satisfied the requirements of what is now s.368 of the Act. That question raises

an important matter of public interest which thus constitutes an exceptional circumstance within the principles discussed in *Metwally*. In those circumstances, it is not necessary for me to consider whether that case imposes a more stringent test than the one applied in

Moustakas. I agree that leave should be granted both to amend the application and to rely upon the three abovementioned grounds on appeal.

The Motion to Add a Further Ground of Appeal

The ground which the appellant seeks to add to her notice of appeal reads as follows:

"Further and in the alternative, the Learned Judge at first instance erred in failing to quash the decision under review on the ground that the delegate had taken into consideration irrelevant considerations, namely perceived inconsistencies between the evidence of the witnesses who appeared before it, and resultant "credibility findings" against all the witnesses, in circumstances where the delegate had made no findings on or in relation to all or any of the following facts."

[There then follows a list of what are said to be those "facts"].

In my opinion despite the manner in which this proposed ground is worded it amounts in substance to a complaint that "the delegate" (presumably a reference to the Tribunal) had not made findings on or in relation to the "facts" so listed. Its whole foundation rests on that complaint which falls within the matters raised in the above amendments. I agree with Jenkinson J. that the ground seems otiose. I would dismiss that motion.

I should add that, in my view, the learned trial judge did not err in the manner alleged. His Honour reviewed the transcript of proceedings before the Tribunal and said that such review:-

"... makes it abundantly clear (much of the evidence being conflicting and jumbled) that the Tribunal was entitled to form the view that it was unable to determine who to believe. Particularly, it was unable to determine whether to believe the assertions of the applicant about the quality of the marital relationship."

His Honour then pointed out that the events which were the subject of conflicting

testimony were not of themselves necessarily important. I agree, with respect. Clearly, any Tribunal is entitled to have regard to inconsistencies between the evidence of witnesses on peripheral matters when forming a view on credibility and to make credibility findings against all the witnesses. As part of that process the Tribunal had the advantage of being able to observe the witnesses as they gave their evidence. In my opinion, the Tribunal did not take into account irrelevant considerations when it considered the inconsistencies between the evidence of the witnesses and made the "resultant credibility findings" as the appellant now complains. The Tribunal was, in the peculiar circumstances of this matter (by which I refer to the Tribunal's eventual conclusion that, on the evidence before it, it was unable to make a finding one way or the other on whether the marital relationship was genuine and continuing) particularly entitled to take into consideration those matters. Obviously, evidence which depends upon credibility cannot become evidence until there is a finding on credibility. The Tribunal found that none of the witnesses were credible. This contributed heavily to the Tribunal's inability to make a finding which would enable it to set aside the decision under challenge.

I now turn to the question whether the Tribunal erred in its decision-making processes and in particular in setting out its reasons for its decision.

Whether the Immigration Review Tribunal Erred?

The issue before the Tribunal was whether, on all the evidence adduced, the appellant satisfied the prescribed criteria contained in Reg.126 of the Migration Regulations 1989 (Cth). That regulation was replaced by the Migration (1993) Regulations (Cth) which came into effect on 1 February 1993, but the saving provisions of the latter regulations caused Reg.126 to continue to apply because the present application was made before 1 February 1993.

The relevant criteria read as follows:

- (1) The prescribed criteria in relation to an Extended Eligibility (Spouse) Entry Permit are that, at the time when the application for the permit is decided:
 - (a) the applicant:
 - (i) is the spouse of:
 - (A) an Australian citizen; or
 - (B) an Australian permanent resident
 who
 - (C) was the spouse of the applicant when the application was made; and
 - (D) nominated the applicant for grant of the entry permit; and
 - (E) has a marital relationship with the applicant that is genuine and continuing; and
 - ...

Regulation 2(1) defined "spouse" as meaning:

- "(a) a person who has entered into a marriage recognised as valid for the purposes of the Act,

where:

- (i) the marriage has not been ended by divorce or the death of one of the parties; and
 - (ii) the parties are not living separately and apart on a permanent basis;
- ..."

The Tribunal reviewed the evidence before it. Apart from the documents comprising the Immigration Department file and other documents received in support of the application to the Tribunal, there was oral evidence. That evidence was given by Mr and Mrs Jones, Mrs Peters, Mr Mundy and his mother Mrs Agnes Mundy. In its written reasons, the Tribunal reviewed and referred to both the documentary and oral evidence. The Tribunal specifically considered the matter of whether Mrs Jones had a relationship with Mr Mundy and Mrs Jones' denial that she had ever had sexual relations with him. Prior to such review the Tribunal stated:

"The Tribunal did not find the evidence of the various witnesses to be reliable. Mr Jones' evidence was vague and evasive and on various occasions, he has had to refer to his wife before he answered the questions put to him by the Tribunal. Mr Mundy suffers from a severe psychiatric condition as indicated by a medical report he had tendered at the outset of the hearing. Although he was a co-operative witness, he soon became anxious and confused. The Applicant's and her sister's evidence was in the main inconsistent particularly in relation to the circumstances surrounding the Applicant's and her husband's first meeting. The Tribunal did not find them to be credible witnesses."

The Tribunal then turned to the question of whether the relationship

between Mr and Mrs Jones was "genuine and continuing". It referred to the test in that regard set out in the Full Court decision of *Minister for Immigration, Local Government and Ethnic Affairs v. Dhillon* (unreported, Judgment No. 200/90, 8 May 1990). The Tribunal next considered the cases which deal with what flows from the consequence of a tribunal being left in a state of uncertainty as to whether the facts necessary to activate the relevant statutory power have been established. The Tribunal referred to various decisions of this Court and the Administrative Appeals Tribunal and stated that, in those circumstances, a Tribunal must decide against the exercise of the power. The Tribunal's reasons concluded in the following terms:

"In this instance, having considered the evidence of the various witnesses as well as the evidence contained in the file, the Tribunal is unable to reach the finding that on the balance of probabilities, the relationship between the Applicant and Mr Jones is a "genuine and continuing" one as required under sub-regulation 126(1)(a)(i)(E). Given the inconsistencies in the evidence of the various witnesses the Tribunal is still in a state of uncertainty as to the standing of the

relationship. Whilst the Applicant's motive for marrying Mr Jones primarily for the sake of gaining permanent residence is not on its own determinative of the issue, when considered in light of the other circumstances the evidence is clearly deficient in disclosing a mutual commitment to a shared life to the exclusion of others.

Given that the Applicant accordingly has failed to meet one of the relevant prescribed criteria, she is not entitled to a spouse EETEP" [being the relevant entry permit sought by Mrs Jones].

The Statutory Framework

Section 135 of the *Migration Act* 1958 relevantly provided as follows:

"DIVISION 5 - DECISIONS OF TRIBUNAL

Tribunal to record its decision etc and to notify parties.

135(1) Where the Tribunal makes its decision on a review, the Tribunal shall prepare a written statement that:

- (a) sets out the decision of the Tribunal on the review;
- (b) sets out the reasons for the decision;
- (c) sets out the findings on any material questions of fact; and
- (d) refers to the evidence or any other material on which the findings of fact were based.

..."

The Tribunal's decision was expressed in these terms:

"The Tribunal affirms the decision not to grant Ester Jones an extended eligibility (spouse) entry permit (code 820)."

In my view, that is the relevant decision to which s.135 applied. It is quite clear that the reason why the Tribunal made that decision was because it

was unable, on all of the evidence before it, to reach a finding that on the balance of probabilities the relationship between the appellant and Mr Jones was a "genuine and continuing" one as required under sub-regulation 126(1)(a)(i)(E). The Tribunal stated this expressly in the second of the two passages from its reasons which I have set out above.

The appellant relies on two passages from the reasons for judgment at first instance in this matter. Those were as follows:

"While it is possible to be critical of the Tribunal's decision in the present case, particularly having regard to the lack of found facts, that is not a matter upon which the applicant relies. Rather, it is accepted that the Tribunal's comments in their reasons on matters such as onus of proof were correct and that the Tribunal could, if unable to accept the evidence of any witness, properly conclude that the applicant should fail.

...

Before concluding this judgment, however, I should repeat that it may be possible to criticise the Tribunal's reasons for decision on the basis that the Tribunal failed to make proper findings of fact. It must be a rare case indeed where a Tribunal, conducting an administrative review, forms the view that none of the witnesses before it can be relied upon with a result that the Tribunal is unable to reach any conclusion at all on a matter essentially of fact. This was not, however, as I have already indicated, a submission explored in argument on behalf of the applicant and accordingly it would be inappropriate for me to comment further upon it."

In my opinion, this is one of the rare cases to which his Honour was referring. This is not a case in which the Tribunal found as a fact that Mr

and Mrs Jones were not in a genuine and continuing relationship. In essence, what the Tribunal found was that because they could not believe the appellant and her witnesses, she had failed to establish, to the Tribunal's satisfaction, that there was the necessary relationship between her and her husband. That was the finding; not that the relationship had been disproved, simply that there was insufficient evidence. The Tribunal carefully considered what had to be proved and then followed the decisions governing the consequence of being left in a state of uncertainty whether the facts necessary to activate the relevant statutory power had been established. The decision-making pendulum remained in equilibrium.

In my view, the Tribunal, in this somewhat unusual matter, complied with the requirements of s.135. It set out its decision and it set out its reasons for reaching that decision. It clearly explained why it was unable to make a finding on a material question of fact and in those circumstances (not being able to make a finding of a material question of fact) there was no obligation in terms of s.135(1)(d) to refer to the evidence.

For those reasons I would dismiss this appeal with costs.

I certify that this and the preceding fifteen (15) pages are a true copy of the Reasons for Judgment of Justice Carr.

Associate:

Date:

IN THE FEDERAL COURT OF AUSTRALIA)
WESTERN AUSTRALIA DISTRICT REGISTRY)
GENERAL DIVISION) NO WAG 63 OF 1995

ON APPEAL FROM A DECISION OF A SINGLE JUDGE OF THE FEDERAL
COURT OF AUSTRALIA

B E T W E E N:

ESTER JONES

Appellant

and

**THE MINISTER OF STATE OF
IMMIGRATION AND ETHNIC
AFFAIRS**

Respondent

CORAM: JENKINSON, CARR & R D NICHOLSON JJ
DATE: 6 DECEMBER 1995
PLACE: PERTH

REASONS FOR JUDGMENT

R D NICHOLSON J:

The nature of this appeal, the circumstances in which it arises and the grounds of appeal are set out in the reasons for judgment of Carr J. I do not repeat them except so far as it may be necessary for the purpose of these reasons.

Leave to rely upon new grounds in amended notice of appeal

It is accepted on behalf of the appellant that, although leave has been granted to file and serve an amended notice of appeal, it lies within the province of the Court to determine whether leave to argue the grounds in that notice should be granted to the appellant given they were not argued before the Court at first instance.

In my opinion such leave should be granted. I reach that position after examination of the following authorities: *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at 480; *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *Green v Sommerville* (1979) 141 CLR 594 at 607-8; *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319; *University of Wollongong v Metwally* (No 2) (1985) 59 ALJR 481 at 482-3; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-9; *Water Board v Moustakas* (1988) 180 CLR 491 at 497; *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 284; *Commissioner of Taxation v Brambles Holdings Ltd* (1991) 28 FCR 451 at 455; *Teoh v Minister for Immigration and Ethnic Affairs* (1994) 49 FCR 409 at 411, 415, 416, 428 and 441. In *Teoh* (supra) the Full Court allowed an amendment to the grounds of appeal at the hearing of the appeal. The Court applied the authorities to which I have referred to the circumstances of that case and did not enunciate any fresh principle. (The case is reported before the High Court in (1995) 128 ALR 353). The effect of these authorities, as I view them, is that where the new grounds could possibly have been met by calling evidence at the hearing or may have resulted in the case of the respondent being differently conducted at the trial, leave will be refused ("the first proposition"). However, where all the facts have been established beyond controversy or where the point is one of construction or of law, then it is a question for the Court of Appeal whether it is expedient and in the interests of justice to entertain the point ("the second proposition"). The *dicta* in *Metwally* (supra) read in the context of the authorities referred to, is to be understood as being to the same effect.

It is common ground that the amended notice of appeal now contains three grounds which are raised for the first time and these grounds do not fall within the first proposition. It is therefore for this Court to decide whether it is expedient and

in the interests of justice that leave should be given to argue the new grounds.

The authorities to which I have referred, while stressing the importance of the public interest in ensuring the finality of litigation, do not view that interest as likely to be paramount where the new grounds are within the second proposition. Lord Watson in *Connecticut* (supra) at 480 said that in the case of the second proposition "it is not only competent but expedient in the interests of justice, to entertain the plea". The rule derives, at least in part, "from public policy considerations directed to ensuring the finality of litigation" and, so far as it does so derive, "the relevant consideration is that the case sought to be made on appeal is a new or different case from that which emerged at the trial": *Banque Commerciale SA* (supra) at 284.

The public interest in finality of litigation attracts particular consideration in this matter because of the manner in which the case was conducted before Hill J. Counsel there declined to pursue the substance of the new grounds, although he did not concede that the Tribunal had made the findings of fact it needed to make.

I consider that the interests of justice in the circumstances of this case are such as would support the grant of leave and, in any event, outweigh the public policy favouring finality in litigation. The first two grounds, expressly, and the third new ground, by repetition of the first ground, allege that the Tribunal failed in its decision making processes because it did not observe the requirements of s135 of the *Migration Act* 1958 as it was at the relevant time (see now s368). Section 135 required the Tribunal to prepare a written statement setting out its decision, its reasons, its findings on any material questions of fact and any references to the evidence

or other material on which the findings of fact were based. This is a statutory duty of a general character to be carried out by the Tribunal in the circumstances of the case before it. The grounds of appeal therefore raise the question of the compliance by the Tribunal with an important statutory duty. In my opinion, whether or not there has been compliance with that duty raises a point of law in the interests of justice which supports and outweighs, in all the circumstances, the public interest in the finality of litigation in these particular circumstances.

For the respondent it was contended that the new grounds should be viewed as an "abuse of process" from which the appellant should be estopped from argument. The rule applicable to the grant of leave in question may have a genesis in estoppel by election in the conduct of litigation, at least with respect to some of its aspects: *Banque Commerciale SA* (supra). However, as was there said by Mason CJ and Gaudron J at 284, the relevant consideration [in that event] is not that the other party is put in a worse position but that he or she may have been so placed". That is not the position in the present circumstances where there is common ground that the case would not have been conducted differently at trial. In any event, the arguments of the respondent in relation to estoppel were based on *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 598 and the principle in *Henderson v Henderson* (1843) 3 Hare 100 at 115. In my opinion those authorities are applicable to separate successive actions. They are not authorities which establish a principle in substitution for the rule derived from the authorities to which I have earlier referred.

Accordingly, I consider leave should be granted by the Court for the appellant to argue the new grounds in the notice of appeal filed pursuant to the leave granted.

Motion to add further ground

On 14 June 1995 the appellant applied for extension of time to file and serve the notice of appeal containing the three new grounds. In reasons delivered on 18 September 1995, Carr J relied upon the circumstances pertaining to the appellant's poverty, her language difficulties, the manner in which her case was handled by previous legal advisers, lack of advice, pursuit of alternative sources of relief and other matters of that nature to grant leave to extend time. The motion to amend the notice of appeal by the addition of a further ground was filed on 10 October 1995. The motion is therefore extremely untimely. In my view it is also unmeritorious, for reasons which will appear. I would refuse leave.

Amendment of original application for review

In my opinion it is not necessary for an amendment to be made to the application for review. The rule concerning the granting of leave in relation to new grounds does not necessitate the original pleadings being amended. Arguably such amendment is only necessary when new grounds would affect the conduct of a trial so that it is necessary for the pleadings or application to reflect the matter at issue. Section 11(6) of the *Administrative Decisions (Judicial Review) Act* (1977) does not require an amendment to the application and in any event does not, in my opinion, have any application when new grounds raising a point of law arise before an appellate court. If, for any reason not now predictable, it is necessary for an appellate court to remit all or part of the matter to the trial judge it may be necessary for an application to amend the application for review to be renewed, but there is no present factor occasioning an application to that effect. The grounds of

appeal are themselves sufficient in respect of any final appellate level. The proper foundation for the issue lies in the grounds rather than in supplemental amendment to the originating application.

Merits

It is convenient to consider the respects in which it is said the Tribunal failed to make or set out its findings on material questions of fact or the evidence supporting it or to reach any conclusion on whether there was a genuine and continuing marital relationship between the applicant and her husband. In doing so, it is appropriate for this Court to examine the reasons of the Tribunal because this is the first occasion on which these grounds have arisen.

In its reasons the Tribunal set out the law on what constituted a "genuine and continuing" marriage. It is sufficient to note that the trial judge accepted that the Tribunal had correctly expressed the law applicable to its consideration of whether the relationship was "genuine and continuing" in terms of the test set out in the judgment of the Full Court of this Court in *Minister for Immigration, Local Government and Ethnic Affairs v Dhillon* (Full Federal Court, 8 May 1990, unreported) at 10-11. It is also common ground that the Tribunal did not err in law in this respect.

The phrase "genuine and continuing" is general in character. The legislation does not specify the matters which must be addressed in applying the test as so expressed, or as expressed in terms of *Dhillon* (supra) ("whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others"). In the decision under review by the Tribunal, the decision maker had referred to the

contents of a "Procedures Advice Manual" applicable in relation to an application for an extended eligibility temporary permit (spouse). The primary decision maker considered his reasons under headings relating to "financial aspects", "nature of the household", "social aspects" and "commitment to each other". These headings mirror those in guidelines issued pursuant to *Migration Regulations* 1989, reg126 in December 1992. These matters involve a determination in relation to the subjective views and objective living arrangements of the persons whose matrimonial relationship is in issue, along similar lines to the tests evolved in a number of Social Security cases and summarised in *Re: Tang v Director-General of Social Security* (1981) 3 ALN N83. In the reasons for decision of the Tribunal no reference is made to the matters to which the mind of the Tribunal was required to be directed in determining the nature of the relationship in question and it is the absence of such structure and the alleged consequent non-compliance with s135 that occasions the present grounds of appeal.

The reason why the Tribunal did not make findings was made apparent in its reasons namely, that it "did not find the evidence of the various witnesses to be reliable". This general statement referred to the oral evidence of the appellant, her sister, her spouse and a Mr Mundy. It is apparent from the reasons that, in addition to oral evidence, the Tribunal had before it "the contents of the file together with the various documents received in support of this application for review". It is apparent that the finding of credibility does not extend to the contents of the file.

The Tribunal was entitled to reach its findings on credibility. Having done so, it found itself unable to find facts. However, it is not contended that the Tribunal could properly have found the facts short of oral evidence. In that

circumstance I am unable to see how it could have been open to the Tribunal to comply with s135 by making findings and referring to the evidence on which such findings were based.

It may be contended that the Tribunal should have extrapolated the matters which were required to be addressed, such as those which are particularised in the grounds of appeal including the nature and extent of sexual contact, if any, that had occurred or was occurring between the appellant and Mr Mundy and the nature and extent of any personal relationship between them. The oral evidence, however, had in part addressed these matters but with the effect which the Tribunal found - namely that it did not believe any of the witnesses.

Once it is accepted that the Tribunal was entitled to its credibility findings, this case comes into the category of "rare case", as it was described by the trial judge, Hill J, in his reasons for judgment at 22, where a tribunal conducting an administrative review, forms the view that none of the witnesses before it can be relied upon. Once that position is properly reached, I do not consider it is possible to criticise the Tribunal's reasons for decision on grounds of non-compliance with s135. To hold otherwise would be in effect to require the Tribunal to have made findings when it had expressly found an absence of evidence to support them.

The matter must also be considered in the context of the approach which a court should take to the reasons of a Tribunal. The considerations in those circumstances are appropriately discussed for the purposes of the present consideration by Foster J in *Mam Ki Kim v Minister of Immigration and Ethnic Affairs* (1995) 37 ALD 481 at 485-6. The important point is that, without insisting upon a standard of perfection, it is the function of a court (in the case of a statutory obligation upon a tribunal to give adequate reasons) to see that the tribunal has exposed its basis of reasoning and expressed its reasons adequately enough for that purpose so that there is no risk that errors will be disguised and legislative policy thwarted. In my opinion when the rare case arises where it is undisputed that a tribunal is entitled to make adverse credibility findings in relation to all witnesses and where it is further not contested that its decision could not be reached in the absence of oral evidence, the tribunal could not be said to have erred in fulfilling its statutory obligation by disclosing that the basis of its reasoning was that it was unable to make relevant findings of fact.

The reasons of the Tribunal may arguably have been strengthened had they included a list of factors which the

Tribunal had considered and the respects in which there was no evidence upon which the Tribunal could act. However, I consider that where the statutory language itself provides no such specificity and where there are no decisions of higher authority providing the specificity it would be artificial to require that specification as a necessary step in the fulfilment of the Tribunal's obligation. Because of its finding on credibility, the Tribunal was unable to find facts on issues relevant to an ultimate finding on the nature of the relationship. To require the Tribunal to set out the issues it had under investigation and the respects in which the evidence fell short of establishing each issue, in circumstances where the Tribunal has properly found it cannot believe any of the witnesses, does not serve any proper purpose of the statute and so would go beyond the boundaries of restraint usually appropriate to a review of a tribunal's reasons by a court. In stating its finding as to credibility the Tribunal has exposed the foundation of its reasoning. The primary judge having found that the Tribunal applied the correct law. In these circumstances I do not consider it can be said that the Tribunal did not have in mind the ultimate facts to be decided.

The third ground also puts the matter in terms of the use made by the Tribunal of the notion of onus. As I read the reasons of the Tribunal, such reference as it made to onus was by way of stating that for it to reach a determination on the issue of the genuine and continuing character of the relationship there must be proof which would make a finding possible. Where it was left in a state of uncertainty such proof would be absent so that the Tribunal would be, as it found it was, "unable to reach the finding... on the balance of probabilities...". In my opinion the Tribunal did not wrongly rely upon the notion of onus of proof (as the ground of appeal asserts) nor did it misapply what was said in *McDonald v*

Director-General of Social Security (1984) 1 FCR 354 (as the written submissions maintain). The only reliance which the Tribunal placed upon *McDonald* (supra) was to support its view that the concept of onus of proof was not directly applicable in administrative proceedings. In that decision Woodward J at 358-9 and Jenkinson J at 369, referred to the possibility that a Tribunal may find itself unpersuaded either that a circumstance exists or that it does not exist.

Jenkinson J said at 369:

"There is, however, in my opinion a dilemma in which either a court or an administrative authority determining rights or liabilities may find itself, for the resolution of which the same principles are applicable by each tribunal. Either tribunal may find itself unpersuaded either that a circumstance exists or that it does not exist. (The same may be said of a past or a future circumstance). The court or the administrative authority will determine, by reference to the substantive law, whether it is the existence or the non-existence of the circumstance which is determinative of the question for decision. In this case the Administrative Appeals Tribunal would determine whether the *Social Security Act* 1947 (Cth), upon its proper construction, required that the applicant's pension be cancelled if she were found not to be permanently incapacitated for work, or required that the pension be cancelled unless she were found to be permanently incapacitated for work. In the former case the Tribunal's lack of persuasion that permanent incapacity did not exist would preclude cancellation. In the latter case the Tribunal's lack of persuasion that permanent incapacity did exist would result in cancellation. An application of the same principles by a court in resolution of the same dilemma is to be found in *Maher-Smith v Gaw* [1969] VR 371. In a court the principles are expressed in terms of the onus or burden of proof. When those principles are applied in an administrative tribunal, there may be risk of misconception if the curial modes of expression are employed."

In my opinion the Tribunal acted in the manner envisaged by this *dicta*.

The matter raised by the additional ground of appeal is that the trial judge erred in failing to quash the decision under review on the ground that "the delegate" had taken into consideration irrelevant considerations, namely, perceived inconsistencies between the evidence of the witnesses and the resultant credibility findings against all the witnesses in circumstances where "the delegate" made no findings on the matters previously referred to and particularised in other grounds. This is pressed as a direct challenge against the proposition that the Tribunal was entitled to rely on credibility findings to avoid making findings of fact although the ground itself addresses the decision of "the delegate". As neither the primary decision-maker nor the Review Officer made such credibility findings, I have addressed the ground as if it related to the Tribunal.

It must firstly be said in relation to this ground that when the Tribunal perceived inconsistencies between the evidence of witnesses, it would not necessarily be the case that it should disbelieve one or other of the witnesses. It was open to the Tribunal either to believe one or other of inconsistent witnesses or to believe neither. In the circumstances of this particular matter the Tribunal believed neither. That was not an incorrect application of the consequence of inconsistency in evidence but rather an exercise of the Tribunal's right to make findings of credibility. Once it properly found it could not believe the witnesses, the Tribunal was unable to make findings on any issue.

In support of each of their contentions in respect of this ground, the parties have filed submissions directing the attention of the Court to the evidence before the Tribunal, possible findings on that evidence, and questions said to be material. For the appellant it is contended the following

matters are ones on which the evidence does not support any genuine dispute or uncertainty:

1. The appellant and her husband ("Mr Jones") have lived together under the same roof since they were married on 29 October 1991.
2. At all times the appellant has cared for Mr Jones on a constant basis on the personal level by cooking, cleaning and attending to his medical needs and the like.
3. Mr Jones is elderly, infirm, sick and in need of constant care.
4. There has been no sexual relationship between the appellant and Mr Jones.
5. Mr Jones has been at all material times incapable of having a sexual relationship.
6. The appellant and Mr Jones have had an affectionate relationship.
7. They shared a bank account.
8. They shared financial transactions.
9. They shared future plans.
10. Mr Jones has a good relationship with the appellant's daughter who lives with them.
11. Mr Jones has given voluntary financial assistance to the appellant, her daughters and her mother and made a will in favour of the first three.
12. At the time of the Tribunal hearing, the appellant and Mr Jones were staying with Mr Mundy in his house in circumstances where they shared expenses and the appellant looked after Mr Mundy (a person in need of care) as well.
13. The appellant and Mr Jones are dependent for their daily life on the assistance of others, a role fulfilled essentially by Mr Mundy.

For the respondent attention is directed to inconsistencies in the evidence of witnesses on the following matters:

- (a) the circumstances in which the appellant came to meet Mr Jones;
- (b) when the appellant first met Mr Jones;
- (c) whether the appellant's sister Mrs Peters, knew Mr Jones before she and the appellant met him in 1991;
- (d) how the appellant and Mr Jones met Mr Mundy;
- (e) when the appellant and Mr Jones met Mr Mundy;
- (f) sleeping arrangements in Mr Mundy's house;

- (g) whether the appellant had a sexual relationship with Mr Mundy, including a range of evidence on the nature of her relationship with him.

The function of this Court in considering this ground is not to enter into the shoes of the Tribunal and perform the tasks which were before it in relation to the evidence. Rather it is to consider whether there is a proper foundation for the Tribunal's conclusion that its credibility findings inhibited findings of fact.

For the appellant it is argued that in the circumstances in respect of which there was no genuine dispute or uncertainty, the absence of a finding of a sexual relationship between the appellant and Mr Mundy should have counted strongly in favour of the appellant.

In my view, that argument proceeds from a false premise - namely, that the matters previously enumerated on the part of the appellant were beyond genuine dispute or uncertainty. On each of them the appellant, Mr Jones or Mr Mundy gave evidence. It was the credibility of these witnesses which the Tribunal could not accept. In my opinion, there was a proper foundation for it not doing so: their testimony was in conflict on issues centrally relevant to the nature of the relationship between the appellant and Mr Jones.

The matter may be illustrated by reference to the evidence on the question whether the appellant had a sexual relationship with Mr Mundy. There was evidence from the appellant that she had once "slept" in the same room as Mr Mundy but not for sex. Mr Mundy's evidence was, first, that because of the effects of old age on Mr Jones, he and the appellant had "had sex" once or twice. Later he denied the appellant was sexually inclined or that she had ever suggested sex to him. Mr Jones first testified that the appellant had a relationship with Mr Mundy.

Later he testified that all that Mr Mundy did was drive the car for them.

In my view, there was an adequate foundation for the Tribunal's conclusion that it could not believe the appellant, Mr Jones, Mr Mundy or the appellant's sister and that, consequently, no findings were open to it. The nature of the inconsistencies were such as to ground the findings of lack of credibility; the evidence of the witnesses to which it related touched all relevant issues before the Tribunal. The additional ground in the motion is therefore unmeritorious.

For these reasons I consider the appeal should be dismissed.

I certify that this and the preceding 13 pages are a true copy of the Reasons for Judgment of his Honour Justice R D Nicholson.

Associate:

Date:

APPEARANCES

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Solicitor

Date of Hearing: 16 October 1995

Date of Judgment: 6 December 1995